Piqua Steel Company *and* International Union of Operating Engineers, Local 18, AFL–CIO. Case 9–CA–32839

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On April 25, 1996, Administrative Law Judge Stephen J. Gross issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge and by discharging employee Richard R. Hedke Jr. because he refused to operate a truck crane that he believed to be unsafe. The complaint alleges that Hedke's refusal to operate the crane was concerted activity protected by Section 7 of the Act, both because it was the result of Hedke's discussions and complaints to the Respondent, in concert with other employees, concerning perceived safety problems with the crane,[1] and because Hedke was acting in reliance on section 28 of the Union's collective-bargaining agreement with the Respondent.[2]

The judge found that the Respondent did not discharge Hedke, but rather laid him off. He found that Hedke's refusal to operate the crane was protected because it was based on a reasonable belief that his action was authorized by section 26 of the collective-bargaining agreement.[3] The judge found that the layoff violated Section 8(a)(1) but that the Respondent did not act unlawfully by informing Hedke that he would be let go, and that he would be laid off for lack of work, if he refused to operate the crane.

The Respondent has excepted to the judge's findings that Hedke's conduct was concerted and protected and that his layoff was unlawful. The General Counsel has excepted to the judge's finding that Hedke was laid off and not discharged, and to his failure to find that Hedke was unlawfully threatened.

For the reasons that follow, we agree with the judge that Hedke was laid off and not discharged and that he was not unlawfully threatened.[4] However, we find merit

[1] See *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffirmed *Meyers Industries*, 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[2] See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

Sec. 28 of the agreement states, in pertinent part, that:

> On [toxic/hazardous] projects, it is expressly understood that if the employees' immediate health and safety are in danger, the employee may discontinue operations, without penalty, until satisfactory results are obtained, or until such time as a recognized safety agent shall declare the equipment or operation to be safe.

[3] The judge found that sec. 28 of the collective-bargaining agreement, the only provision referred to in the complaint, was inapplicable to the facts of this case.

With regard to sec. 26 of the collective-bargaining agreement, that clause provides as follows:

> The Union and the Employer will cooperate in the establishment of a safety program. At the Pre-Job Conference by mutual agreement, the wearing of safety hats may be made a condition of employment. Both the Employer and employees shall comply with the applicable State Safety Codes and any other applicable government or civil regulations pertaining to safety. It is expressly understood that if the employees' immediate health and safety are involved, the Union through its representative may order discontinuation of operations until satisfactory results are obtained.

The judge found that Hedke was not a representative of the Union, and thus was not authorized under sec. 26 of the collective-bargaining agreement to order a discontinuation of operations. There are no exceptions to this finding. The judge also found, however, that a reasonable reading of sec. 26 is that the language empowering the Union to order discontinuation of operations was not intended to limit the right of employees to respond to safety hazards, but instead was to enable the Union to respond to on-the-job safety hazards, in addition to any such right on the part of employees.

In addition, the judge rejected the General Counsel's contention that Hedke's conduct was concerted under *Meyers Industries*. There are no exceptions to this finding.

[4] Our dissenting colleague would find that Hedke was unlawfully discharged, not on March 7, 1995, as alleged in the complaint, but at some later time, when he was not recalled even though, according to the dissent, the Respondent had work that he could have performed. That theory was neither alleged nor litigated, and we therefore find that it is not properly before us.

The complaint alleges, and the parties litigated, the issue of discharge. While the parties may have presented evidence concerning the availability of work for Hedke during his layoff, they did so for the purpose of establishing whether Hedke had been unlawfully discharged on March 7. In the circumstances of this case, the Respondent cannot fairly be charged with unlawfully failing to recall Hedke, after March 7, absent notice and an opportunity to present evidence, not only on the issue of the availability of work, but also on, inter alia, its recall procedures and past practice with regard to recalling employees from a layoff, if any. See *NLRB v. Quality CATV, Inc*., 824 F.2d 542, 547 (7th Cir. 1987). (The simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the complaint be 'fully and fairly litigated' in order for the Board to decide the issue without transgressing [Respondent's] due process rights.") (quoting *NLRB v. Pepsi-Cola Bottling Co*., 613 F.2d 267, 274 (10th Cir. 1980).

Member Brame notes that it is well settled that "[f]ailure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." *J.C. Penney & Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967) (denying enforcement to 8(a)(1) finding not alleged in complaint or litigated); accord: *NLRB v. AAA Fire Sprinkler, Inc*., 144 F.3d 685, 687 (10th Cir. 1998). It must be clear "that the respondent 'understood the issue' and was afforded full opportunity to justify [its actions]." *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 972 (10th Cir. 1990), quoting *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333, 350 (1938) (no due-process violation where respondent placed on notice of alternative theory at hearing).

in the Respondent's contention that Hedke's layoff was not unlawful, and we shall dismiss the complaint. Because we find that the layoff was lawful, we need not decide whether Hedke's refusal to operate the crane was protected by Section 7.[5] We shall assume, for the purposes of analysis only, that his conduct was protected.

The Respondent is a steel erection contractor.[6] Hedke was hired in 1986 to operate and maintain a 450 Lima truck crane, which is the Respondent's largest piece of equipment. Hedke spent about two-thirds of his work time operating and maintaining the Lima crane, and the rest of his time operating and performing heavy maintenance on other kinds of equipment, including smaller cranes.

In August 1994, Hedke began to have problems with the Lima crane. He noticed that the swing, which should be smooth, steady, and accurate, was erratic, had tight spots, and had other problems that could lead to a dangerous condition called side loading. He was also concerned about distortions in the structural components of the crane's boom. Hedke informed the Respondent's management about those problems a number of times, and complained that the problems were becoming worse. Other employees noticed the same conditions on the Lima crane. On two occasions, servicemen who were called in to inspect the crane noticed problems similar to those that Hedke reported. Although both servicemen recommended repairs, the problems were not corrected while Hedke was still operating the crane.

On March 6, 1995,[7] Hedke told union officials Broten Collins and Patrick Sink about the crane's worsening problems and indicated that the crane was not safe for him or for other employees. Sink advised Hedke not to do anything unsafe if he had documentation of the problems.

On March 7, the Respondent's equipment supervisor, Mike Jurosic, told Hedke of a job for the Lima crane scheduled for the next day. The job involved picking up 25,000-pound storage tanks. Hedke asked General Foreman Steve Dowler about the stresses on the crane that the job would entail. Dowler would not tell Hedke what radius would be required and said that he did not know whether the tanks were vertical or horizontal.

After thinking for approximately an hour about the information he had and had not received, Hedke told Dowler that he would not operate the crane on the March 8 job because he thought it would be unsafe. Dowler responded by asking Hedke, "[Are you] trying to be an asshole . . . Did this boom just go bad. . . . Do you know what kind of position you're putting me in? I've got work for that crane." Dowler told the Respondent's president, Earl Sever, that Hedke was refusing to operate the crane. Sever asked Hedke, "What the hell [are you] trying to do now? What's wrong with this boom?" Sever gave Hedke a copy of the most recent recommendations by a serviceman concerning the crane's deficiencies. Sever also told him that if he refused to run the crane, Sever would have to let him go. Sever later tried to persuade Hedke to change his mind, but was unsuccessful. He then told Hedke that if he refused to run the crane, Sever would have to lay him off for lack of work. Hedke asked, "You don't have any work for me?" Sever replied, "No, I don't. Sorry it's got to be this way." Hedke then turned in his keys and credit card to Sever. The document recording Hedke's separation from employment gives "lack of work" as the "reason for termination."[8] It also bears the handwritten notation "Effective Date of Layoff 3–7–95."

On March 8, Hedke went to the union office to sign the out-of-work list. He gave Collins a copy of the serviceman's report and told him that the crane was unsafe. Also on March 8, Sever called the Union to ask for a replacement to operate the Lima crane. After hearing a portion of the serviceman's report, Sink told Sever that the Union would not send a replacement to operate the crane until it had been repaired. The next day, Hedke, Sink, and Collins went to the Respondent's facility and examined the crane. Sink testified that there were noticeable distortions in the crane's boom that called the strength of the boom into question. Sink also asked Sever about putting Hedke back on the payroll, suggesting that there must be work for him to do. Sever replied that he was "looking into issues with the crane."

Member Brame additionally notes that the complaint alleges, in pertinent part, that Hedke was discharged in retaliation for *his* invocation of sec. 28 of the collective-bargaining agreement. There is no allegation that Hedke or anyone else invoked sec. 26, nor is there any allegation that the *Union* invoked sec. 26, sec. 28, or any other provision of the agreement, much less that Hedke was terminated in retaliation for any action underaken by the Union. That the Respondent's counsel may have engaged in questioning concerning the "applicability of Section 26," as the dissent asserts, does not establish that the dissent's theory was fully and fairly litigated in the circumstances of this case, as the issue the parties were addressing was, at best, whether Hedke had invoked sec. 26, and whether an employee could invoke that provision of the agreement. There was no allegation that the Union had in fact invoked sec. 26, and no evidence concerning the parties' practice concerning invocation of sec. 26 by the Union, including whether it was, in fact, properly invoked by the Union in this case.

[5] We therefore do not address the Respondent's argument that it was denied due process when the judge found that Hedke's conduct was protected under sec. 26 of the collective-bargaining agreement, rather than under sec. 28 as alleged in the complaint.

[6] The statement of facts here is based on credited testimony, uncontradicted testimony, and documentary evidence.

[7] All dates hereafter are in 1995.

[8] This document is a form "Termination Notice," apparently furnished by the Union. It refers consistently to "termination," without distinguishing between layoffs and discharges. Reasons for "termination" listed on the form include lack of work, voluntary quitting, and completion of assignment, none of which suggest discharge as the term is commonly understood. We therefore decline to read the printed references to "termination" as suggesting that Hedke was discharged rather than laid off.

Unable to obtain an operator for the Lima crane from the Union, the Respondent had the crane dismantled and repaired. The major repairs were done by outside contractors, but many minor repairs were done in-house. The Respondent rented a subtitute crane, which was operated by Kelly Ross, an employee of the Respondent. The Respondent also hired Brian Fannin as an oiler and changed Scott Newman's status from part-time to essentially full time. When the repairs on the Lima crane were completed on October 23, Hedke was reinstated.

As we have noted, the judge found that the Respondent laid Hedke off, rather than discharging him. We agree with that finding. On March 7, Sever told Hedke that if he refused to operate the Lima crane, he would be laid off for lack of work. Hedke's termination notice also indicates that he was laid off for lack of work. As soon as the Lima crane had been repaired, the Respondent reinstated Hedke.[9] In these circumstances, we agree with the judge that the Respondent laid Hedke off.

We turn now to the issue of whether Hedke's layoff violated Section 8(a)(1). The judge found that the General Counsel had established that Hedke's layoff was motivated by his protected conduct, not merely by his unavailability to operate the Lima crane. The judge relied on the fact that, shortly after Hedke announced that he would not operate the crane, Sever told him, "without further explanation," that his refusal would result in his being "let go." He also noted that both Sever and Dowler had expressed anger when Hedke refused to operate the crane. The judge also found that the Respondent had not proved that it had lawful reasons for removing Hedke from its payroll so abruptly.

We find, contrary to the judge, that the General Counsel failed to prove that the Respondent's decision to lay Hedke off was motivated by his refusal to operate the Lima crane.[10] We find, instead, that the Respondent laid Hedke off because it had no work for him at the time of the layoff, other than to operate the Lima crane, which he refused to do. According to Hedke's own testimony, that is what Sever told him on March 7. As the judge found, there is no evidence that, at the time it laid him off, the Respondent had any work for Hedke besides operating the Lima crane.[11] Indeed, the Respondent's payroll records indicate that its operating engineers as a group worked fewer hours during March, when Hedke was laid off, than in February, April, May, or June. Hedke's termination slip clearly stated that he had been laid off for lack of work. When the crane had been repaired, the Respondent promptly reinstated Hedke.

The record thus supports the Respondent's contention that Hedke was laid off for lack of work. In the circumstances of this case, the Respondent was entitled to lay off Hedke for lack of work even assuming, arguendo, that his refusal to perform the crane work was protected concerted activity.[12] We therefore find that Hedke's layoff did not violate Section 8(a)(1), and we also adopt the judge's finding that Sever's statements to Hedke on March 7 were not coercive. Accordingly, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER FOX, dissenting.

The judge found that the Respondent violated Section 8(a)(1) of the Act by laying off employee Richard R. Hedke, Jr. because he refused to operate a truck crane on a job scheduled for March 8, 1995. My colleagues disagree and dismiss the complaint. For the reasons discussed below, I agree with the judge that the Respondent violated Section 8(a)(1). Unlike the judge, however, I find that its unlawful action consisted of failing to recall Hedke from layoff when work became available, thus effectively converting the layoff to a discharge. I therefore dissent.[1]

Facts

Hedke began working for the Respondent in January 1986. He was hired to operate and maintain a 450 Lima truck crane, which is the largest piece of equipment owned by the Respondent, weighing between 105,000 to 110,000 pounds fully loaded. Hedke spent approximately 65 percent of his work time operating and maintaining the Lima crane, and the remaining 35 percent performing heavy maintenance on tow motors, trucks,

[9] The General Counsel points out that the Respondent reinstated Hedke only after the complaint issued. However, the complaint issued on June 15, 1995, and Hedke was not reinstated until October, after the repairs to the crane had been completed. The timing of Hedke's recall to work thus suggests that it was driven by the availability of a functioning crane rather than by the issuance of the complaint.

[10] We reiterate that, for purposes of analysis, we are assuming without deciding that Hedke's refusal to operate the crane was protected by Sec. 7.

[11] In addition, the judge found that it was entirely reasonable for the Respondent to have used active employees instead of Hedke for the crane and other work that arose during Hedke's layoff. As the judge noted,

> the fact that [the Respondent] employed Hedke at other tasks when there was no crane work to do carries no implication that [the Respondent] would want to keep Hedke on the payroll if, for any reason, he was not available to operate the crane. . . . If one of [the Respondent's] then-working employees was available to operate the crane . . . it made sense for [the Respondent] to staff the crane in that way rather than to bring in an extra crane operator.

No party has excepted to this finding. Accordingly, there is no basis for the dissent's position that the Respondent's failure to recall Hedke is before us, or for our colleague's conclusion that the failure to recall Hedke was unlawful.

[12] We also note that, even though employees who concertedly refuse to work under conditions that they reasonably fear are dangerous may not be discharged, an employer may lawfully treat such employees as strikers and replace them. See *E.R. Carpenter Co*., 252 NLRB 18, 22 (1980). That, in effect, is what the Respondent attempted to do in this case.

[1] As explained below (fn. 16), I do not accept my colleagues' contention that my theory for finding a violation was not adequately alleged or litigated.

and trailers, operating industrial type lift trucks, tractors, 18 wheelers, and other smaller cranes, and shuttling equipment.

The Respondent and the Union are parties to an agreement under which the Respondent agreed to be bound by most of the provisions of the collective-bargaining agreement between the Union and the Associated General Contractors of Ohio. Section 26 of the Union/AGC agreement provides, in pertinent part, that:

> The Union and the Employer will cooperate in the establishment of a safety program. . . . Both the Employer and employees shall comply with the applicable State Safety Codes and any other applicable government or civil regulations pertaining to safety. It is expressly understood that if the employees' immediate health and safety are involved, the Union through its representative may order discontinuation of operations until satisfactory results are obtained.

Section 28 of that agreement states, in pertinent part, that:

> On [toxic/hazardous] projects, it is expressly understood that if the employees' immediate health and safety are in danger, the employee may discontinue operations, without penalty, until satisfactory results are obtained, or until such time as a recognized safety agent shall declare the equipment or operation to be safe.

The agreement between the Union and the Respondent states that the no-strike, no-lockout, and grievance/arbitration provisions of the Union/AGC agreement shall not be applicable.

In early August 1994, Hedke began to experience problems with the Lima crane. As the majority's opinion recounts, Hedke became concerned that the crane was unsafe to operate. He reported the problems to management, but no steps were taken to correct them until after Hedke was laid off because of the brisk pace of business at that time. Between August 1994 and March 1995, the problems seemed to Hedke to become worse.

At a union meeting on March 6, Hedke told union officials Broten Collins and Patrick Sink that the problems with the crane were worsening and that it was not safe for either himself or the other employees. In response, Sink told Hedke that "if you feel as though there's jeopardy placed in your life and the people you work with, especially in your environment, as a labor representative, if you've got some documentation, I suggest you don't do anything to jeopardize workers or anyone."

On March 7, Equipment Supervisor Mike Jurosic told Hedke of a job for the Lima crane picking up storage tanks, each weighing 25,000 pounds, scheduled for March 8. Hedke asked Steve Dowler, the general foreman, about the stresses that would be placed on the crane during this job. Dowler refused to tell Hedke what radius would be required and said he did not know whether the tanks were vertical or horizontal. Hedke deliberated for about an hour over the information he was and was not provided. He then called Dowler and told him he was not going to operate the Lima crane for the job scheduled for March 8 because he believed the crane to be unsafe. Dowler responded by asking Hedke, "Are you trying to be an asshole. . . . Did this boom just go bad?"

Dowler informed Respondent's president Earl Sever of Hedke's refusal. Sever asked Hedke, "What the hell are you trying to do now?" Sever attempted to convince Hedke to operate the crane for the March 8 job and gave Hedke a copy of an inspection report which denied certification to the Lima crane in view of its many "deficiencies." When Sever realized Hedke would not back down, he told Hedke, "If you are going to refuse to run the crane, I'm going to have to let you go." Sever later told Hedke, "If you refuse to run this crane, I'm going to have to lay you off for lack of work." Hedke finished his shift on March 7 and then turned in his keys and credit card to Sever at the end of the workday.

The next day, March 8, the day of the scheduled Lima crane job, Hedke reported to the union office to sign the out-of-work register. While there, he gave union official Collins a copy of the inspection report and told Collins that the crane was not safe to operate. That same day, the Respondent telephoned the Union for a replacement for Hedke to operate the Lima crane. Sever testified that Collins at first indicated that a replacement could be furnished. Later, however, after hearing only a portion of the inspection report, Sink called Sever and told him that the Union would not supply an operator for the Lima crane until the Respondent had the crane repaired.

The following day, Hedke, Sink, and Collins visited the Respondent to examine the crane. Sink testified that the physical distortions in the crane's boom were apparent from a visual inspection. During that meeting, Sink talked to Sever about putting Hedke back on the payroll, suggesting to Sever that surely there was work for Hedke to do. Sever, however, was noncommital in his response, stating that he was "looking into the issues with the crane."

Since the Respondent could not obtain an operator for the Lima crane from the Union, it ordered the crane to be dismantled and began the long process of having it repaired. While major repairs for the crane were done by outside companies, many minor repairs, such as working on the outriggers, painting, and changing the rear end on the crane, were done in-house.

While the Lima crane was being repaired, the Respondent rented a crane to substitute for the Lima crane. The substitute crane was operated by Kelly Ross, one of the Respondent's employees. The Respondent also hired Brian Fannin as an oiler and shifted Scott Newman from part-time to essentially full-time status.

The repairs on the Lima crane were completed on October 23, 1995. The Respondent then reinstated Hedke.

The judge's decision

The judge found that the Respondent laid Hedke off in violation of Section 8(a)(1). In so doing, he found that Hedke's refusal to operate the crane on the March 8 job was concerted activity under *NLRB v. City Disposal Systems*.[2] Thus, the judge found that Hedke honestly and reasonably believed both that the Lima crane was unsafe to operate on the March 8 job and that the crane did not comply with OSHA regulations.[3] The judge also found that Hedke honestly and reasonably understood that the collective-bargaining agreement gave him the right to refuse to operate equipment that did not comply with safety regulations.[4]

In finding Hedke's refusal concerted under *City Disposal*, the judge did not rely on section 28 of the collective-bargaining agreement, as cited above. He found that section 28 pertained only to toxic/hazardous projects and that the job scheduled for March 8 was not such a project. He therefore implicitly found, contrary to the allegations of the complaint, that Hedke could not have reasonably believed that he was privileged under section 28 to refuse to operate the crane for safety reasons. [5]

The judge did, however, find section 26 applicable to Hedke's actions. That section states, in relevant part:

> Both the Employer and employees shall comply with the applicable State Safety Codes and any other applicable government or civil regulations pertaining to safety. It is expressly understood that if the employees' immediate health and safety are involved, the Union through its representative may order discontinuation of operations until satisfactory results are obtained.

The judge found that section 26 could reasonably be read to mean that the language empowering the Union to order discontinuation of operations was not intended to limit the right of employees to respond to safety hazards, but instead was meant to enable the Union to respond to on-the-job safety hazards, *in addition to* any such right on the part of employees.[6] He further found that that provision could reasonably be interpreted as affording employees the right to cease work either if the Respondent was not complying with safety regulations or if the job conditions were such that employees would not be complying with such regulations if they continued to work. Because he found that (1) Hedke reasonably believed that the crane did not comply with OSHA regulations; (2) the collective-bargaining agreement could reasonably be read as giving employees the right to refuse to operate equipment that does not meet applicable safety regulations; and (3) neither the no-strike provision nor the grievance-arbitration provisions of the Union/AGC contract applied to the Respondent, the judge found that Hedke's refusal to operate the crane was protected concerted activity.

The judge found that Sever's statements to Hedke in response to his refusal did not constitute coercive threats because he found that they may have been lawful depending upon the facts then at hand. The judge also found that Hedke was laid off and not discharged by Respondent for his refusal because he believed that "layoff" was the most appropriate term for what had occurred. Finally, the judge found that Respondent's layoff of Hedke, in response to his protected concerted refusal, violated Section 8(a)(1).

Discussion

The Supreme Court in *City Disposal* approved the Board's *Interboro* doctrine,[7] which holds that an employee's reasonable and honest invocation of a right grounded in a collective-bargaining agreement constitutes concerted activity.[8] In *City Disposal*, the Court upheld the Board's determination that an employee who refused to drive a truck because he honestly and reasonably believed that the truck's brakes were faulty was engaged in concerted activity because he was invoking his right under the collective-bargaining agreement not to drive unsafe trucks.[9] The Court agreed with the Board that the employee's refusal to drive the truck did not lose its concerted character either because he failed to show that the truck was actually unsafe or because he did not refer explicitly to the contract.[10] In sum, the Court found that

> As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity[.][11]

Applying these principles, I would adopt the judge's finding that Hedke's refusal to operate the Lima crane was concerted activity.

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[2] 465 U.S. 822 (1984).

[3] Id. at 824.

[4] Id. at 837.

[5] No exceptions were filed to these findings.

[6] The judge found that Hedke could not reasonably be deemed a "representative" of the union, for purposes of sec. 26, when he refused to operate the crane, and that his refusal could not reasonably be deemed to constitute an "order" that there be a "discontinuation of operations." No exceptions were filed to this finding.

[7] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[8] 465 U.S. at 841; *Interboro Contractors*, 157 NLRB at 1298.

[9] 465 U.S. at 839.

[10] Id. at 840.

[11] Id. at 837.

To begin with, I agree with the judge, for the reasons stated in his decision, that Hedke reasonably believed the crane to be unsafe. I also agree with the judge, but for different reasons, that section 26 of the collective-bargaining agreement privileged Hedke to refuse to operate the Lima crane.

As discussed above, Hedke informed union officials on March 6 about the worsened condition of the crane. Union Official Sink advised Hedke not to do anything that would endanger himself or other employees. The next day, Hedke refused to operate the crane on the job scheduled for March 8. Sever then told Hedke he would be laid off for lack of work. Rather than accept work on the Lima crane, Hedke turned in his keys and credit card and reported to the Union hiring hall to seek alternative work. His refusal to operate the crane thus was continuing in nature.

On March 8, Sink refused to dispatch an operator for the Lima crane to replace Hedke. Sink explained to Sever that the Union would not supply a replacement operator until the crane had been repaired. He took that action after hearing a portion of the inspection report on the condition of the crane. This action by the Union's representative effectively constituted an order to "discontinue operations" with respect to the Lima crane on the basis of both Hedke's earlier statements about the dangerous condition of the crane and the report detailing the crane's deficiencies. Sink thus invoked the provision of section 26 that "if the employees' immediate health and safety are involved, the Union through its representative may order discontinuation of operations until satisfactory results are obtained," and thereby put the Union's imprimatur on Hedke's refusal to operate the crane. I find that Hedke's continuing refusal to operate the crane, once endorsed on March 8 by the Union, was protected concerted activity under *City Disposal*. Accordingly, I need not decide whether Hedke's actions on March 7, before the Union shut the crane operation down, were concerted.[12]

I turn now to the question of whether the Respondent's actions against Hedke were unlawful. Initally, I note that on March 7, when Hedke told Sever that he would not operate the crane the next day, Sever replied that he would lay Hedke off for lack of work if he did not run the crane. The Respondent contends that it had no work for Hedke to do besides operating the crane, and nothing in the record refutes that contention *as it pertains to March 7 and 8*. Thus, although Hedke had performed maintenance work and had operated other kinds of equipment besides the Lima crane, there is no indication that any such work was available for him at the time he initially refused to operate the crane and the Union refused to dispatch a replacement for him. Consequently, at the time Sever told Hedke he would be laid off for lack of work, his stated rationale for the action may have been accurate.[13]

The record clearly establishes, however, that work was subsequently available that Hedke could have performed. Sever admitted that, after he dismissed Hedke, the Respondent hired Brian Fannin to work as an oiler, a position that Hedke could have filled. The Respondent's payroll records indicate that Fannin worked essentially full time from the time he was hired in early April at least through the end of June. The Respondent also upgraded Scott Newman from part-time "as needed" work to essentially full-time work from mid-March through mid-May. Newman operated a hydraulic crane and a lift truck on a 5–6 week job; Sever admitted that Hedke was qualified to operate both of those types of equipment. In addition, some of the work repairing the Lima crane was done by the Respondent in-house. That work included repairing the crane's outriggers, changing its rear end, and painting. Sever conceded that Hedke probably could have done that sort of work. Whether Hedke would have accepted those kinds of assignments had they been offered is beside the point.[14] They were jobs that were available and that Hedke was capable of performing, yet he was not given the option of accepting or rejecting them. Thus, even if the Respondent actually had no work for Hedke other than operating the Lima crane at the time the Union endorsed his refusal to operate it, the Respondent failed and refused to offer him the opportunity to work at other jobs for which he was qualified when those jobs became available.[15] In my view, this failure to recall Hedke, or even to offer him a chance to come back to work, effectively converted the layoff to a discharge.[16]

[12] I find no merit in the Respondent's argument that it was deprived of due process by the judge's reliance on sec. 26 of the collective-bargaining agreement as the basis for his finding that Hedke's refusal was concerted. Although the Respondent now objects that it was disadvantaged because the complaint cited only sec. 28 of the contract as a basis for the contention that Hedke's actions were concerted, the Respondent did not object to testimony concerning sec. 26 at the hearing. In fact, the Respondent's counsel actively engaged in questioning about the applicability of sec. 26. Thus, the issue of that section's relevance to Hedke's action was fully litigated.

[13] I therefore agree with the judge that Sever's statement was not unlawful.

[14] Sever testified that once employees have qualified as equipment operators, they generally do not like to step down to oiler status. And Hedke stated that he preferred to operate conventional cranes, like the Lima, rather than hydraulic cranes, which were the only other kinds the Respondent used. But Hedke might well have preferred either working as an oiler or operating a hydraulic crane to being unemployed. In fact, he testified that at times, when he was not operating the Lima crane, he was paid at a lower rate than he received as a crane operator, thus indicating that he might have been willing to accept work at a lower rate rather than be out of work entirely.

[15] I give little weight to the Respondent's reinstatement of Hedke when the Lima crane was repaired in light of the fact that, in the interim, a complaint had issued alleging that he had been unlawfully discharged.

[16] My colleagues contend that this theory of the case was not alleged or litigated. I disagree. The complaint alleged that Hedke was unlawfully discharged, and the issue of what work was available after March

I further find that the failure to recall Hedke was occasioned by the combination of his continuing refusal to operate the Lima crane and the Union's refusal, prompted by Hedke's action, to dispatch a replacement for him, thereby shutting down the operation of the crane until it was repaired. Although Sever informed Hedke on March 7 that he would be laid off if he refused to operate the crane, the reason Sever gave for the warning was that he had no other work to give him. As noted, there is no record evidence that that was not the case *at the time.* And at that same time, Sever apparently had no reason to believe that he could not obtain a replacement for Hedke through the Union's hiring hall. However, the Union refused to send a replacement to operate the crane because of Hedke's complaints about safety. That refusal made it impossible for the Respondent to use the Lima crane until it had been fixed. And thereafter, the Respondent failed to recall Hedke when it had work available that he could have performed. From this record, I infer that the Respondent failed to recall Hedke not simply because he refused to operate the crane, but because he also induced the Union to shut the crane operation down completely, which it was clearly authorized to do under the collective-bargaining agreement.

I therefore find, contrary to the judge, that the Respondent's reaction to Hedke's actions was twofold. It first laid him off for lack of work. Assuming that that action was not unlawful, I nevertheless find that the Respondent's later failure to recall Hedke when work became available, which had the effect of discharging him, violated Section 8(a)(1).

Initially, I agree with the judge that the General Counsel has demonstrated that animus against Hedke's refusal to operate the Lima crane was a motivating factor in the Respondent's failure to recall him.[17] Thus, the Respondent's president and supervisors knew of Hedke's protected conduct. As the judge found, those individuals reacted angrily when Hedke informed them of his decision, thereby showing animus against him for making that decision. I infer that if the Respondent's president and supervisors were angry with Hedke for simply refusing to operate the crane, they would have been even more upset at the Union's shutting down the crane's operation in response to Hedke's complaints. Moreover, the Respondent's failure to recall Hedke when work became available commenced shortly after his refusal to operate the crane culminated in the Respondent's having to take the crane out of operation entirely.

I further find that the Respondent has failed to show that it would have taken the same action against Hedke even in the absence of his protected conduct.[18] The Respondent contends that it had to dispense with Hedke's services because there was no other work for him to do besides operating the Lima crane. The record establishes, however, that this contention is baseless. The Respondent had work available, at least part of the time while the crane was being repaired, which Hedke could have performed, yet the Respondent does not claim that it offered any of that work to him or that it had legitimate reasons for not doing so. I therefore find that the Respondent has failed to carry its rebuttal burden, and that it violated Section 8(a)(1) by failing to recall Hedke, thus effectively discharging him.

James E. Horner, Esq., for the General Counsel.
C. J. Schmidt, Esq. (Wood & Lamping, Esqs.), for the Respondent.
Patrick L. Sink, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEPHEN J. GROSS, Administrative Law Judge. Piqua Steel Company (PSC) is in the business of moving things, mostly vertically. To that end it owns and operates various items of lifting equipment.[1]

The biggest piece of equipment owned by PSC is a Lima 450 truck crane capable of lifting up to 50 tons.[2] At all relevant times through March 7, 1995, PSC employed Richard R. Hedke Jr. to operate and maintain the crane. But on March 7, Hedke told his supervisors that he would not operate the crane on a job scheduled for March 8, because he did not consider the crane to be safe to operate. PSC thereupon laid off Hedke and did not recall him for about 7 months.

The General Counsel contends that, by that layoff, PSC violated Section 8(a)(1) of the National Labor Relations Act (the Act).[3]

I. HEDKE'S REFUSAL TO OPERATE THE CRANE

A. The Lima Truck Crane

PSC's Lima 450 truck crane resembles the huge cranes that everyone has seen in operation next to an under-construction office building or apartment house.

The "house," from which the crane operator controls the crane, rests on a swing bearing that, in turn, is attached to the flatbed of an over-sized truck. A boom is attached to the front of the house. The boom is divided into sections of 10, 20, or 40 feet. These sections can be linked together to make a boom of

7 that he could have performed had he been recalled was extensively litigated. I do not think that it materially alters the theory of the case to find that, instead of being discharged on March 7, Hedke was effectively discharged later when the Respondent failed to reinstate him.

[17] See *Wright Line*, 251 NLRB 1083, 1089 (1980).

[18] Id.

[1] PSC is a steel erection contractor in the construction industry. In its answer PSC denied that the Board has jurisdiction over this matter. But by letter dated December 12, 1995 (which letter counsel for the General Counsel attached to his brief), the Company admitted that it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the National Labor Relations Act (the Act). I am making that letter part of the record as ALJ Exh. 1.

[2] Photographs of the Lima crane are in the record as GC Exh. 4(a) and 4(b). See also GC Exh. 11 at p. 6, fig. 3.

[3] The General Counsel contends that PSC discharged Hedke, as opposed to laying him off. In Part IV of this decision, infra, I discuss why I refer to PSC having laid off Hedke.

up to 180 feet in length although generally PSC's crane is operated with a much shorter boom. In cross-section each section of the boom is rectangular. Four long tubular pieces of metal run the length of each section of the boom. These tubular pieces are called chords. (Looking at a section of the boom head-on, the chords are at the corners of the rectangle.) The boom is strengthened by "lacing"—that is, sets of smaller pieces of metal that run back and forth between the chords.

The entire house-and-boom arrangement is able to rotate through 360 degrees. That capability, of course, is how the operator swings a load from one point to another. Thus the need for the swing bearing (referred to above) as the interface between the house and the truck's flatbed. The swing bearing looks more or less like a tube that describes a circle about 55 inches in diameter. In fact, the tube is split into halves, the long way. In cross-section, therefore, the top half of the tube looks like a C facing downward. The bottom half looks like a somewhat smaller C, facing upward. Crane operators call that tube a "race."[4]

The bottom part of the race is attached to the truck's flatbed. The top part of the race is attached to the bottom of the house. Sixty-five ball bearings the size of tennis balls rest on, and move along, the lower part of the race. The upper part of the race, the house, the boom, and any load that the crane is lifting are supported by the ball bearings and, through them, by the lower part of the race.

A company named Rotek manufactures the swing bearing for Lima 450 truck cranes. Everyone familiar with these cranes accordingly refers to the bearing as "the Rotek."

B. Hedke's Concerns

Beginning in mid-1994, Hedke began to have a problem rotating the crane smoothly. It seemed to Hedke that there was a "tight spot" in the Rotek. What concerned Hedke about the difficulty in swinging the crane smoothly is this. The Lima truck crane's boom is designed to handle vertical loads, not loads to the side. If the crane does not swing smoothly when moving a load, the load can either get ahead of the boom or fall behind it. Either way that creates side loading. If the forces to the side are large enough, and if the load that the crane is lifting is heavy enough, the boom can collapse.

It was Hedke's job to maintain the Lima truck crane as well as to operate it, and he routinely made repairs to the crane. But dealing with a Rotek problem is unusual in three respects. First, although there is an inspection port in the Rotek, much of the Rotek cannot be examined without first disassembling it. Second, the Rotek cannot be disassembled for examination or repair without lifting the house off the flatbed—a significant undertaking. Third, replacement of a Rotek swing bearing can take months, in large part because of having to wait for the manufacturer to supply one.

Hedke's concern about the swing problem was exacerbated by the fact that the crane's boom had its own problems. In virtually every one of the boom's sections, much of the lacing (the pieces that run between the boom's chords) was bent to one degree or another. The bending distorted the boom, weakening it. Some bent lacing is not unusual in big cranes. But as PSC's management recognized, the bending of the lacing on PSC's crane was worse than is generally the case.

In mid-1994, Hedke began to complain to his supervisors about the Rotek problem and, to a lesser extent, about the bent lacing.

The Company responded by having the crane inspected. The inspector, while agreeing with Hedke about the bent lacing and the possible Rotek problem, did not recommend that the crane be taken out of service for repairs then and there.[5] But he did recommend that the repairs be made soon. Meanwhile, management agreed that when customer requests for the crane slowed, the Company would to do what was necessary to repair the boom and eliminate the tight spot in the swing. Hedke assented to this plan.

But business turned out to be better than expected, and customers kept providing PSC with a steady flow of work for the Lima truck crane. And PSC's management was unwilling to turn business away in order to repair the crane.

As the weeks passed, however, it became increasingly difficult for Hedke to swing the crane smoothly. The tight spot, that is, kept getting tighter. And Hedke kept complaining to management about his difficulties with the crane.

C. The Events of March 7

On Tuesday, March 7, 1995, Hedke's immediate supervisor told Hedke that PSC had a job for the Lima truck crane on March 8. The job involved "picking" storage tanks. (That is, lifting the tanks from the vehicles that had transported them to the site, standing them up, and placing them in the spots on which they were to remain.) The tanks weighed 25,000 pounds each.

Hedke called PSC's general foreman, Steve Dowler, to get as much information as he could about the job. Hedke wanted to know how long a boom would be needed, what "radius" would be needed, and whether the tanks were vertical or horizontal.

Each of those questions was relevant to the stresses that the job would put on the crane. The relevance of boom length is obvious. As for Hedke's reference to "radius," he was referring to the maximum horizontal distance that the job would require between the base of the crane and the load being lifted. The greater that distance, the greater the stress on the crane. And Hedke's question about whether the tanks would be vertical or horizontal was, essentially, another question about boom length and radius.

Dowler said that the job called for a boom length of 80 or 100 feet. Dowler did not say–in fact he refused to say (as Hedke remembered it)–what radius would be required and whether the tanks were vertical or horizontal. (At the time of the hearing, PSC no longer employed Dowler. No party sought to call Dowler as a witness.)

Hedke sat with that information (and lack thereof) for an hour or so, and then called Dowler to say that he was not going to operate the crane on that job. "I don't feel the crane is safe," Hedke told Dowler, because of the bent lacing and the rotation problem, "plus not knowing what I was going to get into on the job."[6]

That refusal on Hedke's part to handle the next day's tank-setting job led to several conversations between Hedke and PSC's chief executive, Earl F. Sever III. The upshot of these conversations was that PSC laid off Hedke as of the end of the

[4] The relevant dictionary definition of a "race" is "a groovelike part of a machine in which a moving part slides or rolls." (American Heritage Dictionary.)

[5] "[D]eformed . . . members in the crane structure" and "worn . . .or distorted . . . bearings" are "deficiencies." They may or may not constitute "a hazard." GC Exh. 11, p. 27.

[6] Witness Hedke at Tr. 135–136.

workday on March 7. As will be further discussed in part III, infra, PSC did not again operate the crane until the boom, the Rotek, and various other parts of the crane were repaired. Repairs were completed in October 1995. At that time PSC recalled Hedke to operate the crane. As of the hearing, Hedke remained in PSC's employ as the operator of the Lima truck crane.

D. NLRB v. City Disposal Systems

NLRB v. City Disposal Systems, 465 U.S. 822, 824, 837 (1984), holds, inter alia, that an employee's refusal, on safety grounds, to operate an employer's equipment is concerted activity that is protected by Section 7 of the National Labor Relations Act if the employee "honestly and reasonably believed" the equipment to be unsafe and if the employee's refusal was "based on a reasonable and honest belief that he is being, or has been, asked to perform a task he is not required to perform under his collective-bargaining agreement."

The question of whether Hedke's refusal to operate the crane should be considered to be concerted activity presents difficult issues. I discuss them below, in part II. And even assuming that, that refusal constituted concerted, protected, activity, it is not entirely clear that PSC violated the Act when it laid off Hedke on March 7. That is discussed in part IV of this decision.

But as for whether Hedke honestly believed that the Lima truck crane could not have safely performed the tank-picking job scheduled for March 8, and whether that belief was reasonable, that is entirely clear. Hedke did honestly hold such a belief, and the belief was a reasonable one.

Further evidence of the reasonableness of Hedke's safety concerns is noted in parts II and III of this decision.

PSC appears to argue that it was not unreasonable for it to have kept the crane in operation and to have accepted the March 8 tank-picking job. I make no finding contrary to that assertion. Specifically, I do not find that there was any danger of collapse had the crane been used as scheduled on March 8. But that does not aid PSC's cause here. The question is whether Hedke honestly and reasonably believed that the boom might collapse. And Hedke did honestly hold precisely such a belief, which belief was a reasonable one.[7]

II. DID HEDKE'S REFUSAL AMOUNT TO CONCERTED ACTIVITY

Since Hedke honestly and reasonably believed that it would be unsafe to operate the crane on the job scheduled for March 8, his refusal was protected by the Act if the collective-bargaining agreement between his union and PSC can reasonably be read as granting employees right to refrain from operating unsafe equipment. *City Disposal* at 837 and 839.

This part of the decision deals with whether the collective-bargaining agreement can be so read and, if not, whether Hedke's refusal should for other reasons be deemed to be concerted activity.

A. The March 6 Union Meeting

The Charging Party, Operating Engineers Local 18 (the Union), represents the PSC employees who operate and maintain the Company's cranes and lift trucks.[8] As such the Union represents Hedke, and Hedke has long been a member of the Union.[9]

On March 6, 1995, the Union held one of its monthly meetings. Hedke attended. As Hedke understood the collective-bargaining agreement between the Union and PSC, it protected employees from having to work under dangerous circumstances. Hedke had previously discussed the crane's problems with Union officials. At this meeting he talked to union officials Broten Collins and Patrick L. Sink, about how the crane's boom and rotation problems were getting "really bad,"[10] so much so that operation of the crane was endangering himself and anyone working near it. In response, Collins told Hedke that he would contact PSC about the crane. Sink told Hedke that "if you feel as though there's jeopardy placed in your life and the people you work with, especially in your environment, as a labor representative, if you've got some documentation, I suggest you don't do anything to jeopardize workers or anyone."[11]

Neither Collins nor anyone else from the Union contacted PSC about the crane on either March 6 or March 7. There were discussions between representatives of the Union and PSC on March 8, but they were engendered by PSC's layoff of Hedke.

B. The Collective-Bargaining Agreement

PSC and the Union are parties to a me-too agreement by which PSC agreed to be bound by most, but not all, of the provisions of the collective-bargaining agreement between the Union and the Association of General Contractors of Ohio.[12] Article II of that collective-bargaining agreement is applicable to PSC. It contains two sections relevant to employee refusals to operate in unsafe conditions.

Section 28 states that "it is expressly understood that if the employees' immediate health and safety are in danger, the employee may discontinue operations, without penalty." But that language applies only to "toxic/hazardous projects." And the scheduled March 8 job was not such a project.

The other provision, section 26, reads:

> The Union and the Employer will cooperate in the establishment of a safety program. At the Pre-Job Conference by mutual agreement, the wearing of safety hats may be made a condition of employment. Both the Employer and employees shall comply with the applicable State Safety Codes and any other applicable government or civil regulations pertaining to safety. It is expressly understood that if the employees' immediate health and safety are involved, the Union through its representative may order discontinuation of operations until satisfactory results are obtained.

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[7] I note that I also do not find that it would have been safe for the crane to have been used on the March 8 job.

[8] Broadly speaking, lift trucks are heavy-duty forklifts. They typically function as mobile cranes in enclosed areas.

[9] For further identification of the PSC employees represented by the Union, see Tr. 238 and GC Exh. 3, par. (2). The General Counsel alleges, PSC admits, and I accordingly find that the Union is a labor organization within the meaning of Sec. 2(5) of the Act.

[10] Testimony of witness Sink, quoting Hedke, at Tr. 191.

[11] Sink at Tr. 191.

[12] The collective-bargaining agreement between the Union and the AGC is in the record as GC Exh. 2. The me-too agreement is GC Exh. 3. They became effective on May 1 and September 22, 1992, respectively. All parties agree that both agreements remained in effect at the time of the events here at issue.

C. Was Hedke's Refusal to Operate the Crane Concerted Activity by Reason of the Collective-Bargaining Agreement–Conclusion

An initial question is whether Hedke could reasonably be deemed to be a "representative" of the Union, for purposes of section 26, when he refused to operate the crane, and whether Hedke's refusal could reasonably be deemed to constitute an "order" that there be a "discontinuation of operations."

I think not.

To begin with, Collins' and Sink's responses to Hedke's March 6 complaints about the crane were very guarded. Collins told Hedke only that he would look into the matter. And Sink's comment was (as discussed above), "if you've got some documentation, I suggest you don't do anything to jeopardize workers or anyone." As of the time on March 7 that Hedke first told his supervisors that he would not operate the crane on the March 8 job, Hedke had no "documentation" apart from a month-old inspection report.

More importantly, Hedke held no position with the Union. The Union did not inform PSC that the Union had constituted Hedke to be its representative for matters pertaining to the Lima truck crane. And, Hedke gave no indication to his supervisors that he was speaking on behalf of the Union when he refused to operate the crane.

That brings us back to the intent of section 26. Does that Section mean that if employees want to discontinue work, in the face of supervisors' orders to keep working, because of what the employees perceive to be safety hazards, the employees must stay on the job unless and until a representative of the Union orders a discontinuation of operations? That reading is strengthened, after all, by the language of section 28, which states that, in the case of unsafe "toxic/hazardous projects," "the employee may discontinue operations, without penalty." Language of that ilk is notably absent from section 26.

But that is just one possible reading of section 26. Another reasonable reading of section 26 is this. The language about the Union being empowered to order discontinuation of operations is not intended to limit what otherwise would be the right of employee to respond to safety hazards. Rather, that language is intended to enable the Union to respond to on-the-job safety hazards, in addition to any right the employees have to respond to on-the-job safety hazards.

Under that reading, the only portion of the collective-bargaining agreement relevant to Hedke's refusal to operate the crane reads:

> Both the Employer and employees shall comply with the applicable State Safety Codes and any other applicable government or civil regulations pertaining to safety.

There remains the question of whether this sentence in the collective-bargaining agreement is intended to give employees the right to cease work if the employer is not complying with "government . . . regulations pertaining to safety" or if, because of conditions on the job, employees would not be complying with such regulations if they continued to work. As to that, I need only conclude, as I do, that one reasonable interpretation of the sentence is that it does give employees such a right.[13] (In reaching that conclusion I have taken into account that neither the no-strike provision nor the grievance-and-arbitration provisions of the Union-AGC collective-bargaining agreement are applicable to PSC.)[14]

The record does not tell us whether PSC's Lima truck crane complied with all "regulations pertaining to safety" at the time Hedke told his supervisors that he would not operate the crane on the job scheduled for March 8. But Hedke believed that the crane did not comply with the regulations of the Occupational Safety and Health Administration. And OSHA does indeed impose safety requirements on companies operating truck cranes. See 29 CFR Section 1910.180. Hedke additionally believed that since the crane did not comply with OSHA regulations (in Hedke's view), the collective-bargaining agreement gave him the right to refuse to operate the crane.

In summary, we are presented with a string of honestlies and reasonablenesses. Hedke honestly and reasonably believed that the crane was unsafe to perform the March 8 job. One reasonable interpretation of the collective-bargaining agreement is that its reference to the Union being empowered to order a "discontinuation of operations" is not intended to deny employees whatever right to refuse to perform unsafe work that the agreement otherwise provided. Once that interpretation is made, a reasonable reading of the agreement gives employees the right to refuse to operate equipment that does not comply with governmental safety regulations. Finally, Hedke honestly and reasonably understood the agreement to give him the right to refuse to operate equipment that failed to comply with safety regulations, and he honestly and reasonably believed that the crane did not comply with OSHA regulations.

Is that enough to conclude that Hedke's refusal to operate the crane was concerted? Arguably not. Compare, for example, the provision of the collective-bargaining agreement at issue in *City Disposal*:

> The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appliances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified.[15]

Here, there is nothing specifying that employees may refuse to operate equipment not in safe operating condition. And, presumably, unions and employers ought to be permitted to agree to the procedures to be followed in circumstances in which an employee believes that the job presents a safety hazard.

But if PSC and the Union wanted employees to follow some specific procedure whenever the employees believed that violations of safety regulations existed, it would have been easy enough for them to have adopted an agreement that said so. And in cases like *Bechtel Power Corp*., 277 NLRB 882 (1985), the Board decided that a broad reading of *City Disposal* would best further the purposes of the Act.[16] I conclude, therefore,

[13] See *City Disposal* at 840; *Wheeling-Pittsburgh Steel Corp*., 277 NLRB 1388, 1394 (1985), enfd. 821 F.2d 342 (6th Cir. 1987).

[14] See GC Exh. 3, par. 4(c). Compare *Asbestos Removal, Inc*., 293 NLRB 352, 356 (1989).

[15] 465 U.S. at 824–825. See also the collective-bargaining agreement provisions in *Ryder Truck Lines*, 287 NLRB 806, 807 fn. 5 (1987).

[16] The collective-bargaining agreement provision at issue in *Bechtel* read: "It is the duty of all workmen and Employers to see that safe working conditions are maintained on all jobs at all times, according to NJAC Code 12:180 and all state and federal regulations." 277 NLRB at 897.

that Hedke's refusal to operate the Lima truck crane on the job scheduled for March 8 was a concerted, protected, act.[17]

D. Did Hedke's Refusal Amount to Concerted Activity for Reasons Other than the Collective-Bargaining Agreement

If, when Hedke refused to operate the crane on the March 8 job, he was doing so "on the authority of other employees and not solely by and on behalf of . . . himself," his refusal was concerted and therefore (under the circumstances at hand) protected, even had there been no applicable provision of a collective-bargaining agreement. *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (hereafter *Meyers II*).

The evidence does show that several other PSC employees considered the Lima truck crane to be unsafe because of the problems that concerned Hedke, and that Hedke and these other PSC employees discussed the crane's safety problems. Further, on one occasion not long before March 7, PSC employee David Engle, in concert with Hedke, proposed to a supervisor that PSC assign Engle and Hedke the job of disassembling the crane and inspecting the Rotek. (The supervisor vetoed the suggestion.) But the record contains no evidence that Hedke ever discussed with any PSC other employee that Hedke refuse to operate the crane.

As for what Hedke said to his supervisors when he refused to operate the crane, Hedke spoke in the first person singular to Dowler (the general foreman) and, initially, to Sever (PSC's chief executive). Hedke told Dowler, "I'm not going to do that job. I don't feel the crane is safe." Hedke then said to Sever : "I don't feel safe in [the crane], with the boom being in the shape that it is, and the Rotek, I don't feel safe running the crane, we're going to have to fix it." But after Sever responded that PSC would therefore have to let Hedke go, Hedke told Sever that the crane was a safety hazard to everyone who was near it while it was operating, including other PSC employees.

Perhaps a further consideration in this respect should be the piece of equipment at issue. We are discussing, after all, a crane scheduled to lift and swing 12-1/2 ton storage tanks at the end of boom at least 80 feet long. As Hedke's comment to Sever indicates, the collapse of a boom under these circumstances would almost surely endanger not only the crane's operator, but other employees as well.

But the fact that an employee's otherwise non-concerted act addresses hazards presented by equipment that, if it fails, is likely to injure other employees does not, apparently, thereby render the act concerted. Cf. *Wheeling-Pittsburgh Steel*, supra.

As for the belief on the part of other PSC employees that the Lima truck crane was unsafe, that does not constitute proof that Hedke's refusal to operate the crane was "on the authority" of those other employees. I accordingly conclude that, but for section 26 of the collective-bargaining agreement, Hedke's refusal to operate the crane on the job scheduled for March 8 would not have been a concerted, protected, act. See *Meyers II*.[18]

[17] See also *Wheeling–Pittsburgh Steel Corp*., supra.

[18] I note that the "continuing vitality" of *Meyers II* is not entirely clear. See *Aroostook County Memorial Ophthalmology Center*, 317 NLRB 218, 220 at 12 (1995); see also *Talsol Corp*., 317 NLRB 290 fn. 1 (1995). On the other hand, the Board continues to cite *Meyers II* with approval. E.g., *Compuware Corp*., 320 NLRB 101, 103 (1995); *Federal Security*, 318 NLRB 413, 418 (1995).

III. EVENTS SUBSEQUENT TO HEDKE'S REFUSAL TO OPERATE THE CRANE

To engage in some kinds of work, cranes must be certified by certain designated inspectors. And some companies needing crane work specify that the crane must be certified even though no governmental requirement so specifies. (The work scheduled for March 8 fell into neither of these categories.) Some time in early 1995 Sever decided that it would be to PSC's advantage to have the Lima truck crane certified. PSC hired Cairo Marine Service to make the necessary inspection. Cairo Marine did so on March 1. The inspection report showed that the crane was able to lift the loads it was designed for. But the report also remarked that, inter alia, the crane had a "problem swing[ing]" and that much of the boom's lacing needed to be repaired. According to the report, the crane could not be certified until these "deficiencies" were repaired.[19]

In the course of Sever's discussion with Hedke on March 7 (about Hedke's refusal to operate the crane on the job scheduled for March 8), Sever gave Hedke a copy of the Cairo Marine report.

On the morning of March 8, Hedke visited his union hall to register for work. (The Union maintains an exclusive hiring hall.)[20] While at the hall, Hedke told a union official that he considered PSC's Lima truck crane to be unsafe and gave the official his copy of the Cairo Marine report. Later that same day, PSC asked the Union to provide another operator for the crane. But based on what Hedke had said about the crane and on the Cairo Marine report, the Union refused to do so. Further conversations between PSC's Sever and the Union's Collins and Sink made it clear to Sever that the Union would not supply an operator for the crane until PSC had the crane repaired.

PSC accordingly took the crane out of service forthwith and began the long process of having it overhauled. (It turned out that the Rotek's bottom race was badly pitted in one spot—which was the reason for the tight spot that Hedke had complained about. PSC replaced the Rotek.) The overhaul was completed on October 23, 1995, at which time PSC recalled Hedke to operate the crane.

IV. DID PSC'S LAYOFF OF HEDKE VIOLATE THE ACT

Everyone agrees that at the close of business on March 7, Hedke's work for PSC came to a temporary end. The ultimate question in this proceeding is whether PSC took that employment action regarding Hedke in retaliation for Hedke's protected act of refusing to operate the crane on the job scheduled for March 8.

I start with what PSC's supervisors said to Hedke.

It will be recalled that it was Dowler, PSC's general foreman, whom Hedke first told that he would not operate the crane on the March 8 job. According to Hedke's credible testimony, Dowler responded:

> Are you trying to be an asshole . . . . Did this boom just go bad . . . . Do you know what kind of position you're putting me in? I've got work for that crane.[21]

Dowler told Hedke that he was going to have to take the matter up with Sever. And a few minutes later Sever spoke to

[19] The report is in the record as GC Exh. 6. See fn. 5, supra, regarding the term "deficiency."

[20] See secs. 30 and 32 of the collective-bargaining agreement and Tr. 205.

[21] Tr. 136–137.

Hedke about his refusal. The conversation started with Sever saying: "What the hell are you trying to do now? What's wrong with the boom." After a brief further conversation, Sever said something on the order of, "if you're going to refuse to run the crane, I'm going to have to let you go."[22]

But the communications between Sever and Hedke did not end there. Rather, Sever tried to coax Hedke into withdrawing his refusal to operate the crane. Hedke continued to refuse. Ultimately, after some low-key chatting, Sever told Hedke, "if you refuse to run this crane, I'm going to have to lay you off for lack of work." Hedke responded, "don't you have any work for me?" Sever concluded the conversation by saying, "No, I don't. Sorry it's got to be this way."[23]

As for other facts relevant to whether PSC's action toward Hedke on March 7 violated the Act:

1. As of March 7, Hedke had been employed by PSC for more than 9 years. For all of those 9 years PSC employed him as the operator of the Company's Lima truck crane. That job entailed maintaining as well as operating the crane.

2. Through all of those years PSC laid Hedke off only for a couple of days.

3. Hedke was PSC's highest paid crane operator. Other jobs at PSC for which Hedke was qualified paid less.

4. Hedke spent somewhere between 15 percent and 35 percent of his time at PSC at tasks other than operating and maintaining the Lima truck crane.

5. The record provides no information on PSC's practice (if any) regarding how the Company deals with the operator of a given piece of equipment when the Company takes that piece of equipment out of service for an extended period or when the operator becomes unable (or unwilling) to operate that equipment.

6. As of the time that PSC laid off Hedke on March 7, PSC had not yet tried to obtain another operator for the crane.

These facts present perplexing issues.

Consider that in the situation leading to the City Disposal case, the employer fired the employee for refusing to drive one of the company's many trucks. In *Washington Aluminum Co*., 370 U.S. 9 (1962), the employer fired the employees who refused to work in a bitingly cold shop. In *Wheeling-Pittsburgh*, supra, the employer fired the crane operator who refused to operate an unsafe crane. In *Roadway Express*, 217 NLRB 278 (1975), enfd. 532 F.2d 751 (4th Cir. 1976), the employer fired the employee for refusing to drive a truck that the employee considered to be unsafe. In *Union Electric Co*., 275 NLRB 389 (1985), the employer handed out disciplinary suspensions to employees who refused to climb a stairway that they considered to be unsafe.[24]

PSC, however, did not tell Hedke that he was being discharged or otherwise advise him that he was being disciplined. Rather, Sever told Hedke that he was being laid off. (Recall that in the last exchange between Sever and Hedke on March 7, Sever said, "if you refuse to run this crane, I'm going to have to lay you off for lack of work.") And PSC brought Hedke back on board as soon as it had completed the overhaul that Hedke had urged on PSC.

Additionally, PSC told the Union that it had laid off Hedke. The Union provides forms to employers to use when employers end—even temporarily—their employment of employees represented by the Union.[25] The form is headed "Termination Notice." But the form permits employers to check boxes indicating reasons for the "termination." One of those boxes is labeled "lack of work." It was that box that PSC checked on the form that the Company submitted to the Union regarding Hedke. PSC also stated on the form, "effective date of layoff 3–7–95."[26]

The parties have not pointed me to any *City Disposal*-type case in which the employer reacted in that manner.

The General Counsel points out that some appreciable part of the time, the Company assigned Hedke to tasks unrelated to the Lima truck crane. These jobs included operating PSC's lift trucks and even painting Sever's lawn furniture. The General Counsel argues that PSC's failure to retain Hedke on the payroll and have him work at such jobs could only be a function of PSC's animus towards Hedke stemming from Hedke's refusal to operate the crane on the March 8 job.

But PSC had hired and retained Hedke as the highly paid operator of its largest crane. He was assigned other work only when PSC temporarily had no work for the Lima truck crane. The fact that PSC employed Hedke at other tasks when there was no crane work to do carries no implication that PSC would want to keep Hedke on the payroll if, for any reason, he was not available to operate the crane.

On occasion during the Lima truck crane's overhaul, PSC accepted jobs requiring a crane comparable in lifting capacity to the Lima truck crane, rented a crane of that capability, and then assigned one of its employees—not Hedke—to operate it. But again, that does not suggest animus toward Hedke. If one of PSC's then-working employees was available to operate the crane in those circumstances (as Sever credibly testified), it made sense for PSC to staff the crane that way rather than to bring in an extra crane operator. Additionally, Sever knew that Hedke did not like operating hydraulic cranes, and hydraulic cranes were the only type that PSC operated during the March 8–October 23 period. (The Lima 450 truck crane is a "conventional" crane, not a hydraulic crane.)

Still, why did PSC lay off Hedke so abruptly? Hedke had worked the entire day on March 7 repairing one of the Lima truck crane's many parts. Was there no more repair or maintenance work to be done on the crane that needed an employee with Hedke's skills? Conceivably PSC proceeded on the assumption that it would have a replacement for Hedke in hand at the start of the workday on March 8. But PSC first contacted the Union about a replacement on March 8, and Sever suspected that the Union might be unwilling to provide a replacement for Hedke. And once Sever decided to have the crane overhauled, why did PSC not recall Hedke so that Hedke could help get the crane ready for its overhaul or so that Hedke could work on those parts of the crane that PSC was going to overhaul in-house? The record provides no answer to any of these questions.

I conclude that PSC's layoff of Hedke violated Section 8(a)(1) of the Act.

[22] Witness Hedke at Tr. 138.

[23] Witness Hedke at Tr. 146.

[24] See also *Meyers Industries*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941, cert. denied 474 U.S. 948 (1985), reaffd. *Meyers II*, supra (an employer fired a driver when the driver refused to drive an unsafe truck; but the Board dismissed the complaint because the activity was not concerted).

[25] See sec. 91 of the collective-bargaining agreement.

[26] GC Exh. 7.

The General Counsel proved that within minutes after Hedke concertedly refused to operate the crane on the March 8 job and after expressions of anger by both Sever and Dowler, Sever told Hedke, without further explanation, that Hedke's refusal would result in Hedke being "let go." Although I consider the issue to be a close one, I conclude that that is enough to constitute a prima facie case that PSC's layoff of Hedke was directed at Hedke's concerted act, not merely at the fact that Hedke had become unavailable to operate the crane. And PSC did not rebut that case by proving that it had lawful reasons for removing Hedke from its payroll so abruptly. In sum, I conclude that PSC would not have laid off Hedke on March 7 but for management's animus toward Hedke stemming from his concerted refusal to operate the Lima truck crane on March 8.[27]

That, in turn, raises a terminology issue. Perhaps I should not have referred to PSC's March 7 action, regarding Hedke as a "layoff" since PSC took its employment action regarding Hedke as soon as it did in response to Hedke's protected activity and since PSC did not show that it had no other work that it could appropriately have assigned to Hedke. But other common terms—such as "termination," "discharge" or "suspension"—seem even less appropriate.

There is just one last consideration to discuss in respect to whether Hedke's layoff violated the Act. Hedke on numerous occasions warned his supervisors that the crane needed repair. But until March 7, he did not inform them that he considered the crane too hazardous to operate. Yet no specific event occurred on or just prior to March 7, to cause the crane to suddenly become significantly more dangerous to use. Under these circumstances one would expect Hedke to have given his supervisors some notice about his unwillingness to operate the crane so that they would not accept customer requests for the crane under the assumption that Hedke would operate it. (Consider, in this light, Dowler's above-discussed response to Hedke's refusal to operate the crane: "Did this boom just go bad . . . Do you know what kind of position you're putting me in? I've got work for that crane.") But I know of no requirement in the Act that an employee concerned about incremental diminishments in the safety of his equipment has to plan ahead in order to gain the Act's protections when he finally decides that the equipment has become too hazardous to use.

[27] The collective-bargaining agreement suggests that PSC may have employed Hedke on a weekly basis. See sec. 50 of the agreement. If that was in fact the case, that could have various implications relevant to the outcome of this proceeding. But this matter was not discussed at the hearing.

V. DID SEVER UTTER A COERCIVE THREAT

Sever told Hedke, "if you're going to refuse to run the crane, I'm going to have to let you go," and, "if you refuse to run this crane, I'm going to have to lay you off for lack of work." As just discussed, whether PSC could lawfully have taken action in accord with these statements depended on the facts then at hand. That being the case, I cannot conclude that the statements themselves were coercive.

THE REMEDY

PSC laid off Hedke on March 7 and did not rehire him until on or about October 23, 1995. Inherent in the conclusions expressed above is that, but for PSC's violation of the Act, PSC would have continued to employ Hedke beyond March 7—albeit, perhaps, only briefly. As for just how much of the period between March 8 and October 23, PSC would have employed Hedke but for the Company's violation of the Act, I leave that to the compliance stage.

The recommended order accordingly requires PSC to make Hedke whole for any loss of earnings and other benefits he may have suffered as a result of the PSC's unlawful layoff of Hedke. Such losses shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]